No. 03-1388

IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,
Petitioner,

v.

NORWEGIAN CRUISE LINE, LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* MEDITERRANEAN SHIPPING COMPANY CROCIERE, S.p.A.

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act ("ADA") apply to foreign-flagged cruise ships?

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INTEREST OF THE *AMICUS CURIAE* [1]

Mediterranean Shipping Company Crociere, S.p.A. ("MSC") is a family-owned company, duly formed and existing under the laws of Italy. MSC currently owns and operates seven cruise vessels that, as our name implies, offer

[1] The parties in this case have consented to the filing of *amici* briefs. Letters of consent are on file with the Clerk of this Court. In accordance with Supreme Court Rule 37.6, MSC affirms that no counsel for any party has authored this brief in whole or in part and no person or entity, other than MSC, contributed monetarily to the preparation or submission of this brief.

itineraries that are predominantly in the Mediterranean. Of the cruise vessels we own and operate, several fly the Italian flag. At the present time, two of our seven cruise vessels offer a transatlantic and Caribbean itinerary and the only contact that these vessels have with the United States is when guests embark at Port Everglades, Florida for cruise itineraries in the Caribbean and South America.

We take great pride in the fact that we are a family owned and operated company. We also take pride in our Italian heritage and the hospitality we offer to all our guests. We believe that we offer something unique to our guests, something special, something that is not available on any other cruise line and which, depending upon the Court's decision in this case, may no longer be available to American citizens who are unwilling or unable to embark and disembark our cruises in ports other than those located in the United States. Indeed, if the Court determines that Title III of the Americans with Disabilities Act ("ADA")[2] applies to foreign-flagged vessels while in American ports, MSC will likely cease offering embarkation and disembarkation in the United States and will be required to plan alternate routes for our vessels so as to completely avoid U.S. territorial waters. The costs associated with complying with the law, coupled with the increased exposure to litigation and administrative proceedings, will simply outweigh any incentive, economic or otherwise, that may exist for us to offer our cruises in the United States.

We are confident that the substantive legal arguments will be addressed by the parties and other *amici* and write primarily to offer just one example, albeit relevant and important, of how far reaching and impractical the extra-territorial application of the ADA would be.

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[2] 42 U.S.C. 12181 *et seq.*

However laudable their goals, Petitioner and their amici would have this Court take on the task of applying this law in such a way that Congress, the branch of government responsible for enacting the law, did not expressly intend and which conflicts not only with the United States' treaty obligations but also with the historical separation of powers that the framers drafted into the U.S. Constitution.

We respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

We begin with an affirmation of the belief that all people, regardless of physical or psychological condition, are entitled to respect and should, to the extent possible, be able to enjoy and participate fully in all the pleasures of a cruise holiday.

Toward this end, and in accordance with our obligations under Italian and European Union law[3], MSC has developed (and continues to develop) a disabled guest policy. We firmly believe that we have a duty to give focused and special attention to guests who are developmentally challenged. From the moment they make a reservation with us (or a travel agent as the case may be) until they leave the passenger

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[3] *See e.g.*, Chapter III, Article 20 of The Charter of Fundamental Rights of the European Union prohibiting discrimination "based on *any* ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership in a national minority, property, birth, *disability*, age or sexual orientation." (*emphasis supplied*). See also Article 26 of this same directive entitled "Integration of persons with disabilities" provides that "The Union recognizes and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.", Council Directive 98/18/EC, Council Directive 99/35/EC (addressing accessibility of passenger ships for visually impaired citizens); Council Directive 98/41/EC (providing guidelines for passenger ship masters).

terminal at the end of the cruise, we attempt to offer whatever assistance our guests require.

Notwithstanding attempts by Petitioners and their amici to portray all cruise vessel owners and operators as multi-billion corporations, with a significant presence in the United States, and whose sole motivation for engaging in this business activity is deriving revenue from Americans, our experience proves otherwise.

Insofar as we do not have any employees in the United States, we rely on third parties (i.e., agents) to accept reservations and to notify us in the event that a guest seeking to cruise with us has a disability or, for that matter, any other special requirements that we need to be aware of in order to insure that *all* our guests have a safe and enjoyable holiday. Strangely, Petitioner and their amici find this offensive and/or discriminatory. *See e.g.*, Petitioners brief at pp. 17-20. Presumably, if we did *not* ask our guests about disabilities or special needs and, consequently, were not equipped to meet those needs, we would be accused of being insensitive and failing to meet our obligations under the ADA.

As soon as we are advised that a disabled passenger has made a reservation with us, the process of meeting (and hopefully even exceeding) that guest's needs and desires is initiated. Our head office in Naples, Italy is notified and arranges for a "Special Assistance Squad" to be on board. The squad consists of the following; Master, Staff Captain, on-board physician, Safety Officer, Deputy Purser, Hotel Manager, Housekeeper, Cabin Steward, bellperson, Maitre d'Hotel, Bar Manager and Cruise Director, each of whom are informed of the particular guests presence on board and, to the extent we are advised by the guest, any special needs or requests.

While we make a concerted effort to anticipate our guests' needs, we do not have the capacity to read any guest's mind.

Our ultimate concern, of course, is the health and safety of all our passengers. In point of fact, if we are required to comply with Title III of the ADA, we run the risk of subjecting ourselves to liability for violations of other laws with which we must comply and offending other passengers who pay the same amount and, in many instances, more for the pleasure of boarding our cruise ships and experiencing the unique hospitality we offer.

For example, what if one of our disabled guests has a service dog that they wish to bring aboard with them? If we restrict this guest's access to say, for instance, our magnificent buffet area so as to prevent the possibility that the service dog's fur from entering other guests' food, are we discriminating against our disabled guest? What if the health code or sanitary laws of another port of call prohibit any animal from being within a specified proximity of food preparation or dining areas? Are we permitted and, perhaps, even required to inquire of all our other guests if they have allergies to dogs so as to insure that they are not placed in close proximity to a guest who is accompanied by a service dog? Are we violating the law if we require a guest with a service dog to dine in a specific area of the vessel so as not to interfere with the dining experiences of other guests who, for whatever reason, might be offended by the presence of an animal while they are eating? Do we need to hire a veterinarian or will we be subject to a lawsuit if we fail to provide medical care to a service dog that becomes injured or ill? Where is a vessel owner or operator to turn for answers?[4]

Each time questions of this nature or a compliance issue presents itself, are we required to spend thousands of dollars

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[4] *See* DOJ, *COMMONLY ASKED QUESTIONS ABOUT SERVICE ANIMALS IN PLACES OF BUSINESS* available at http://www.usdoj.gov/crt/ada/qasrvc.htm (last visited January 24, 2005). We note, with interest, that there was (and is) no mention of cruise ships as one of the types of business to which the ADA applies.

consulting U.S. attorneys who are, apparently, in no better position to assure us that a particular course of conduct on our part will (or will not) subject us to allegations of discrimination?

We respectfully offer, for this Court's consideration, our own experience with the Department of Justice's ("DOJ") attempt to apply Title III of the ADA to our company.

In July, 2003, one of our agents in New York received correspondence from the DOJ notifying us that a Complaint was filed against our company, requesting information pertaining to our company and advising us that the DOJ would appreciate our cooperation in providing it with information and documents necessary for a thorough evaluation. The Complaint alleged that we failed to comply with Title III of the ADA because we refused to allow a patron to bring a certified hearing dog on one of our vessels.[5]

The allegation that we refused permission to a service animal was admitted because, after consulting with (and relying upon) the advice provided by an American law firm, we reached an agreement with this individual to provide her, at no additional cost to her, with an attendant.[6]

Thereafter, DOJ informed us that it had determined that MSC's "policy of precluding all service animals on all cruise

[5] The individual seeking to bring her service dog on board was demanding, among other things, a four foot by four foot by two foot box, filled with mulch, for her service dog.

[6] This "patron" advised our agent that she was canceling her cruise with MSC, not because of MSC's refusal to allow her service dog on board but, rather, because "I will be going into a hospital in New York City for an operation." With all due respect, we were left to wonder if the service dog would be accompanying her into the operating room of the hospital insofar as hospitals provide lodging, dining facilities and other services to the public, they too are, presumably, covered by Title III of the ADA.

ships, notwithstanding the offer to provide an attendant to the complainant while aboard the ship, violates Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. Sections 12181-12189, and the Department of Justice's implementing regulation, 28 C.F.R. Part 36." Relying upon the Fifth Circuit Court of Appeals decision in this case, MSC declined the DOJ's invitation to alter our disabled passenger policy to allow service dogs aboard our vessels.

Contrary to the arguments set forth by Petitioners and their amici, Title III of the ADA does not currently apply to and, in point of fact, should not apply to foreign-flagged vessels. The DOJ's own website is illustrative on this point. DOJ indicates "Ships registered under foreign flags that operate in United States ports *may* be subject to domestic laws, such as the ADA, unless there are specific treaty prohibitions that preclude enforcement."[7] (*emphasis supplied*). As we read this, it is entirely possible that ships registered under foreign flags that operate in United States ports may *not* be subject to the ADA.

Petitioner and its *amici* offer a myriad of reasons why deference to the laws of so called "flags of convenience" is not warranted. We respectfully submit that the Italian flag does not fall within this category. Moreover, we are constrained to point out that most scholars attribute the selection of flags of convenience in response to another impractical U.S. law (i.e., the 18th amendment to the Constitution), a law which was subsequently repealed.[8]

[7] *See* DOJ, *Americans with Disabilities Act Title III Technical Assistance Manual 1994 Supplement* available at http://www.usdoj.gov/crt/ada/taman3up.html (last visited January 24, 2005).

[8] See H. Edward Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 Tulane Maritime Law Journal 139, 156 (1996). *See also*, U.S. Constitution 21st Amendment.

Title III of the ADA does not currently apply to foreign-flagged ships because, as the Fifth Circuit correctly noted, in the absence of express language to the contrary, there is a presumption against extra-territorial application of U.S. law.

As a practical matter, even today, a cruise vessel owner, flying the *American* flag, is not able to determine whether it is in compliance with the ADA yet, under Petitioners' and its amicis' analysis, the vessel owner and operator are still liable. Some 14 years after the law's enactment, the federal agencies charged with the responsibility of adopting comprehensive regulations and guidelines pertaining to Title III, have *still* not done so for cruise vessels. See Petitioner's brief, p. 5, fn. 1. Why? Is it because both DOJ and DOT realized, both at the time that Title III was enacted and even today, that application of Title III to cruise ships was (and is) not practical given the physical characteristics of cruise vessels including, primarily, the fact that they operate in a marine environment? Have they come to the conclusion, through years of research and discussions on the implications of applying Title III to cruise vessels, that application of Title III to *any* vessel, regardless of what flag she flies under, is not "readily achievable?" 42 U.S.C. 12182(b)(2)(A).

We are not suggesting that unbridled laissez-faire capitalism can operate to resolve the issue of discrimination against persons with disabilities. Nor are we suggesting that laws governing accessibility of passenger ships are an inappropriate means by which to prevent such discrimination from occurring. Rather, given the nature of cruising, we are of the opinion that a *truly* comprehensive (i.e., international) approach is what is needed so that the rights of *all* persons (legal and actual) are protected.

CONCLUSION

The decision of the United States Court of Appeals for the Fifth Circuit in this case must be upheld.

Respectfully submitted,

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